IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 813 of 1998
With
CRIMINAL APPEAL No. 943 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MR.JUSTICE KS JHAVERI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge?

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SANDHYABEN BALMUKUND - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Opponent(s)

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Appearance :

Criminal Appeal No.813 of 1998

THROUGH JAIL for Appellant(s) : 1,
MS MONA B RAVAL for Appellant(s) : 1,
MR PM VYAS for Appellant(s) : 1,
MS REKHA H KAPADIA for Appellant(s) : 1,
MR HIREN P VYAS for Appellant(s) : 1,
MR SC SHAH, PP WITH MR KP RAVAL,APP for Opponent: 1

Criminal Appeal No.943 of 1998

MR SC SHAH, PP WITH MR KP RAVAL,APP for Opponent: 1
MR MJ BUDDHABHATTI for Respondent as amicus curiae

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 17/09/2007

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. Criminal Appeal No.813 of 1998 has been filed by the original accused No.2-Sandhyaben Balmukund, wife of Yogesh Balmukund Pandit against her conviction for the charge under Sec.302 of IPC sentencing her to suffer for life and to pay fine of Rs.100/-, in default, to suffer further two months RI and for the charge under Sec.201 of IPC sentencing her to suffer for two years RI and to pay fine of Rs.100/-, in default, to suffer further two months RI vide judgment and order dated 30-7-1998 passed in Sessions Case No.192 of 1997 by the learned Addl. Sessions Judge, Panchmahal at Godhra. Both the sentences were ordered to run concurrently.
2. Criminal Appeal No.943 of 1998 has been filed by the State against the acquittal of original accused No.1-Dinesh Bhanalal Solanki for all the charges levelled against him vide the aforesaid judgment and order.
3. In view of the order dated 3-7-2007 passed by this Court, learned counsel for the appellant, Mr.P.M.Vyas has filed his

appearance on behalf of appellant- Sandhyaben Balmukund. As far as the respondent of Criminal Appeal No.943 of 1998 is concerned, though he has been duly served, he has chosen not to appear either personally or through advocate. Therefore, for the purpose of disposing of Criminal Appeal No.943 of 1998 along with Criminal Appeal No.813 of 1998, we have requested learned Senior Counsel, Mr.M.J.Buddhabhati to represent him as amicus curiae and he has voluntarily offered to render his services and an order to that effect has also been passed on 29-8-2007.

4. The short facts of the prosecution case are that on 19-7-1999 at about 5.50 p.m., a male and a female Hindi speaking persons came to the reception counter of Champaner Hotel situated in the Village Machhi, Pavagadh, and the male thin person aged about 30-35 years had requested for a room. At that time, the lady, who accompanied the male person was sitting on the bench opposite to the hotel room. After noting down the details in the Hotel Register, room No.103 was allotted to them. When key has been handed over to them, they demanded more airy room No.104 and, therefore, room No.104 was allotted to them. At about 9.00 p.m., waiter went to room No.104 and informed that the meal is ready if required but the male person denied in Hindi

language. On the next day at about 8.30 a.m., when the counter person was settling the account of the previous day, they could not find receipt No.35 and, therefore, they verified the guest house register wherein they found that name and address portion of the entry No.1022 have been torn out. On a minute checking, they could read “dhar” and “dharaj' appearing at the said place. On verification, they realized that relevant portion of above entry has been torn out and the carbon copy of entry No.35 of the receipt book was also missing. Therefore, the complainant called his Watchman, Rameshbhai Bhikhabhai and inquired about the same. In reply, he stated that from 5.00 a.m., he went to the hotel for allotting room to the visitors and thereafter, he was busy in kitchen for providing hot water to the guests. He further stated that during that time, somebody must have torn out the entry out from the register as well as the carbon copy of entry No.35 from the receipt book. The complainant tried to find out in whose favour said entry has been made and receipt has been issued. For that, he also took assistance of other people but could not be found out till 11 a.m. At 11 a.m. it was the time of check out and he was sitting in reception counter. At that time, occupant of

room No.103 Suresh Modi came there and inquired about the occupant of room No.104. Mr.Suresh Modi informed the complainant that at about 3.30 a.m. he heard a male voice shouting for help. However, as he was afraid, he could not come out from his room and, therefore, complainant called his Waiter Lalsinh and inquired from him. Lalsinh stated that at 7.00 a.m., when he went near room No.104 on a routine check, room was locked from outside and, therefore, he went to Mr.Trivedi and Devrajbhai and said Suresh Modi, occupant of room No.103, went to room No.104 and he opened the lock and entered into the room where he saw two bed sheets and pillion covers missing and side of the bed was having blood stain marks. Same way, floor of room No.104 was also having blood stain marks but same have been tried to wash out and, therefore, they entered into the balcony which is at the backside of the room. There also, blood stains were found and, therefore, immediately he locked the room and went backside of the room where he found the dead body of a male person at the backside of room No.109 very near to the drianage. He realized that it is the dead body of occupant of room No.104 and, therefore, immediately telephonically informed Halol Police Station. After noting down the same, PSI, Rathod of

Halol Police Station came to the scene of offence and inquired about the same and noted down the complaint given by the complainant. Same has been sent with yadi to Halol Police Station. On receiving the same,PSO, Halol Police Station registered the offence as Halol Police Station C.R.No.I-246 of 1997 under Secs.302, 201 and 114 of IPC and Sec.120(b) of B.P.Act against a woman aged abut 35 years. He prepared the panchnama of scene of offence of room No.104 along with dead body which has been found at the backside of room No.109 in the presence of panchas and seized the muddamal. He also prepared inquest panchnama in presence of panchas, filled up Marnotar Form and made arrangements for sending dead body of the deceased for post mortem along with yadi to Government Hospital at Halol. On a verification of the guest register of the hotel, it has been found that against the above referred entry, 'dhar' has been mentioned and, therefore, he prima facie came to the conclusion that the person might be from the area of Dhar and, therefore, he informed the Second PSI of Halol Police Station to go to Dhar and inquire into it. In pursuance of that, Second PSI, Halol Police Station went to Dhar along with photographs of dead body of the deceased. He could find

out the whereabouts of deceased and he was belonging to Village Dharampuri and presently staying at Manavar. He informed this to PSI, Rathod, and he came with the relatives of deceased. As wife of the deceased was not in a good physical condition, she was permitted to stay with her brother and, thereafter, after performing post mortem, dead body was handed over to the brother of the deceased. He also recorded statements of brother of the appellant accused-Sandhyaben and others and the appellant was arrested on 23-7-1997. As she expressed willingness to show and produce the clothes thrown into the lake, seamers were called for and same have been seized by drawing panchnama under Sec.27 of the Indian Evidence Act. During the course of investigation, since name of the accused Dinesh had come out, arrangements were made to arrest him and ultimately, PSI, Mr.Parmar brought him and arrested on 24-7-1997. Thereafter, again panchnama of scene of offence was prepared as per the place shown by the accused. Thereafter, he showed willingness to produce the clothes alleged to have been worn by him at the time of incident and which he hid in the urinal of Udaipur S.T.Depo and, therefore, all went there and clothes have been seized in the presence of panchas by drawing panchnama to

that effect. He further showed willingness to show the knife used in the alleged offence from the Village Rushmani and, therefore, all went there and same was also seized. He also seized the clothes which he handed over to Manager of Vishrant Gruh, Village Balvaha, M.P. He also seized the shoes alleged to have been put up by him at the time of incident from the residential house of his father-in-law at Pipaliya Village. During the course of investigation, he recorded further statements of various witnesses and also sent the muddamal to FSL and collected the FSL and post mortem reports etc. and all were kept in investigation file. Upon completion of investigation, charge sheet was submitted in the Court of learned Judicial Magistrate (First Class), Halol against both the accused.

5. As the offence being exclusively triable by the Court of Sessions, learned Judicial Magistrate (First Class), Halol, committed same to the Court of Sessions, Panchmahal at Godhra, where it was numbered as Sessions Case No.192 of 1997 and was transferred into the Court of learned Addl. Sessions Judge, Panchmahal at Godhra, for disposing the same on merits. On production of the accused, the learned Addl. Sessions Judge framed charge against the accused. The charge was read over

and explained to the accused. The accused pleaded not guilty to the charge and prayed for trial.

6. To prove the charge against the accused, prosecution examined 39 witnesses in all. The prosecution has also produced and proved documentary evidence numbering 43.

7. On submission of closing pursis by the learned APP, learned Addl. Sessions Judge recorded further statement of the accused under Sec.313 of Cr.P.C. qua incriminating evidence. Thereafter, after hearing the learned advocates appearing for the respective parties, learned Addl. Sessions Judge delivered the judgment whereby the appellant-original accused No.2-Sandhyaben Balmukund, wife of Yogesh, wife of Yogesh Balmukund Pandya was convicted while original accused No.1-Dinesh Bhanalal Solanki i.e. respondent of Criminal Appeal No.943 of 1998 has been acquitted against which, both the aforesaid respective appeals have been filed.

8. We have heard learned counsel, Mr.P.M.Vyas for the appellant of Criminal Appeal No.813 of 1998, learned Senior Counsel, Mr.M.J.Buddhabhatati for the respondent of Criminal Appeal No.943 of 1998 as amicus curiae and learned Public Prosecutor, Mr.S.C.Shah for the State along with learned APP, Mr.K.P.Raval in both the appeals.

9. It has been mainly argued by the learned counsel, Mr.P.M.Vyas for the appellant of Criminal Appeal No.813 of 1998 that the appellant has been falsely involved in the crime in question and there is no evidence worth the name to connect her with the crime in question. He has taken us through the oral evidence of all relevant witnesses namely, complainant, P.W.4, Barad Harisinh Gambhirsinh, Ex.22, Rameshbhai M. Solanki, Sweeper, P.W.10, Ex.45 and Watchman along with other evidence and argued that if we believe the say of the above referred witnesses, then also, prosecution is not in a position to establish the case against the appellant beyond reasonable doubt. It has been further argued that she has been arrested from her matrimonial home situated at Dhar District of Madhya Pradesh and was brought to Pavagadh and was falsely involved. Even as per the evidence on record of all persons directly connected with the hotel, no one is in a position to depose before the court nor is the prosecution in a position to establish that when the deceased came to the hotel, she had accompanied him. As such, the complainant is not an eye witness as he was not sitting at the counter at the relevant time when the deceased approached for room and the entry in the register has been made

by the Sweeper. Taking us through the complaint, evidence of the complainant and Sweeper, Rameshbhai M. Solanki, it has been argued that all the above referred evidence are not connecting the appellant with the crime in question and are contrary to the case of the prosecution. It is true that the deceased has been brutally killed. It is also true that it is a homicidal death but, according to him, merely because she is the wife of the victim, the appellant should not be held guilty. It has also been argued that the way in which the incident has taken place, her presence is not established and hence, the appellant should be given benefit of doubt. It has also been argued that the appellant has already undergone practically about 11 years of imprisonment. In view of the aforesaid and also in view of the fact that the original accused No.1, the alleged paramour of the appellant, has been acquitted by the court below, she may also be given benefit of doubt and may be acquitted.

10. Learned P.P., Mr.Sunit shah has vehemently opposed contending inter alia that presence of the appellant has been established by way of evidence of the complainant and Rameshbhai M. Solanki, the Sweeper. Once presence of the appellant has been established at the time of incident, it is her duty to explain as to for

what purpose she had been there. When she was not able to explain satisfactorily her presence at the scene of offence, Court should believe the say of the prosecution witnesses and it has been done by the court below whereby the appellant has been convicted. Since the said conviction recorded by the court below is just, legal and proper, the impugned judgment delivered by the court below is not required to be interfered with but is required to be confirmed.

11. As far as the appeal filed by the State against the acquittal of original accused No.1, who is the respondent of Criminal Appeal No.943 of 1998 is concerned, it has been argued by Mr.Shah that he is the paramour and has been arrested by the police officer from his residence at the earliest and thereafter to connect him with the crime in question, sufficient evidence are on record and, therefore, court below ought not to have acquitted him. It is therefore prayed that the impugned judgment delivered by the court below qua him is required to be interfered with.

12. Learned senior counsel, Mr.Buddhabhatti, who appeared on behalf of the original accused No.2, respondent of Criminal Appeal No.943 of 1998, as amicus curiae, has vehemently objected the same. He strongly relied on the

judgment of the Apex Court in the cases of State of Goa Vs. Sanjay Thakran and another with Subhash Chandra Nanda Vs. Sanjay Tharkan and another, reported in 2007(3) SCC page 755 and contended that there is no error committed by the court below in the impugned judgment in recording the order of acquittal. Since the acquittal of the original accused No.1 by the court below has been proper and legal, same is not required to be interfered with. It is therefore prayed that Criminal Appeal No.943 of 1998 is required to be dismissed.

13. We have gone through the evidence on record shown to us by the learned counsel for the respective parties together with the impugned judgment delivered by the court below.

14. For the purpose of deciding these appeals, apart from the evidence of complainant, P.W.4, Ex.22, Barad Harisinh Gambhirsinh, Manager of the hotel, the evidence of other important witnesses namely, P.W.10, Ex.45, Rameshbhai M. Solanki, Sweeper, P.W.13, Ex.51, Ramabhai B.Tadvi, P.W.16, Ex.54, Bachubhai Savjibhai Rathva and P.W.24, Ratansinh Bhagvansinh Parmar Ex.90, are required to be seen. Over and above the evidence of aforesaid witnesses, another material evidence is the evidence of Medical Officer, P.W.23, Ex.88, Dr.Hemlata Gupta, the

lady doctor, who performed post mortem on the dead body of the victim and who proved the post mortem note Ex.70. Prosecution has also proved the panchnama of scene of offence as shown by the accused Dinesh on 24-7-1997 Ex.39, panchnama of scene of offence Ex.18 as shown by the complainant as well as discovery panchnama of knife Ex.42.

15. As far as the external as well as internal injuries to the deceased are concerned, same have been proved by the prosecution through the oral evidence of Dr.Hemlataben Gupta. Inquest panchnama Ex.8 also has been proved by the prosecution along with the evidence of panchas of inquest panchnama and other evidence on record. Through the evidence of persons serving in the hotel, prosecution has proved that the death of the deceased was homicidal. Since this aspect has not been disputed by the otherside, we are not dealing with the same further.

16. Once it is established beyond reasonable doubt that the death of the deceased was homicidal death, then question arises whether the prosecution is able to connect the accused with the crime in question or not and for that, as stated above, three witnesses namely, P.W.10, Ex.45, Rameshbhai M. Solanki, Sweeper, P.W.13, Ex.51, Ramabhai B.Tadvi, P.W.16, Ex.54, Bachubhai Savjibhai Rathva are

the material witnesses and we have gone through the evidence of all the three witnesses over and above the evidence of the complainant.

17. On a scrutiny of the evidence of the complainant, who was examined as P.W.4, Barad Harisinh Gambhirsinh at Ex.22, it appears that he is claiming to be present at the reception counter at the relevant time. However, it is established from the evidence of Sweeper Remeshbhai M.Solanki that the complainant was not present at the reception counter at the time when victim has come to the reception counter for room. This is supported by the FIR as well as the evidence of PSI, P.W.39, Raghunath Rathod, Ex.113 and other evidence on record. It is clear that the entry made in the hotel register was by the Sweeper, Rameshbhai Solanki. It appears that name of the victim has been found to be missing from the relevant portion of the register as well as in the carbon copy of the receipt book on the next day morning when they tallied the cash with the receipt book. It is required to be noted that hotel register would be available at the counter as and when person is moving here and there but receipt book would normally not be available at the counter so as it to be easily taken away or torn by anybody.

18. The above portion of the evidence creates a strong doubt in the mind of the Court as to whether the receipt book remained at the counter itself during the whole night or not. If a person wanted to tear or destroy the evidence, then, the whole receipt book, which is small in size, would have been destroyed which is not done in this case.

19. It is also noted as having come out from the evidence of Mr.Rameshbhai Solanki that he himself was tallying the amount with the carbon copy of the receipt book. This aspect also creates a doubt in the mind of the Court as to the presence of the complainant at the place of incident.

20. Apart from the above, there are evidence on record indicating that when the victim approached the reception counter, he was accompanied by a lady, who was sitting on the bench away from the counter. There is an admission on the part of prosecution witnesses that the person sitting at the counter would not be able to see the lady sitting on the bench. Not only that, there is no reason forthcoming from the side of the prosecution as to why the entry in the hotel register has been made by the Sweeper if the complainant has been there at the counter of the hotel.

21. Thus, it is established from the evidence of

witnesses that the complainant was not present at the time of incident. It is also established that nobody from the hotel has seen the lady sitting on the bench away from the counter. There are also no evidence on record to show that after taking the room No.104, the appellant went into the room along with the deceased and left at midnight or any time thereafter. At this stage, it may be noted that it is a hotel having a compound wall and a Watchman on duty for 24 hours.

22. Said Watchman, Ramabhai B.Tadvi, has been examined by the prosecution as P.W.13 at Ex.51. He has categorically deposed before the Court that he was serving as a Watchman since last 20-22 years. He has further deposed that in the morning, he was busy in supplying hot water to the occupants of the hotel. It may however be noted that without opening the gate of the hotel by somebody, one cannot enter into the compound of the hotel. No evidence worth the name is forthcoming to show that anybody has opened the gate at night and that the appellant had left the hotel at midnight.

23. Once the prosecution has failed to establish that the lady, who went inside the room along with the deceased and thereafter left the room was the appellant-Sandhyaben, the other things that might have been established by

the prosecution would not have much value. Therefore, though the unfortunate death of the husband of the appellant has taken place in the hotel, the appellant cannot be held guilty for the same especially when prosecution is not able to establish her presence.

24. Facts however remain that the appellant has been brought immediately from her Village in Dhar District of Madhya Pradesh to Pavagadh by the Police. The conduct of the lady is also required to be seen. If she has involved in the offence in question, she would have kept away from the matrimonial home after the incident. However, she remained at her matrimonial home itself. Looking to the aforesaid conduct of the appellant also, she cannot be held guilty for the commission of offence.

25. Apart from the above, prosecution is not in a position to bring the telephonic vardhy on record. As per the say of the prosecution witnesses, Watchman of the hotel has informed the police regarding the dead body of the deceased lying at the back of room No.109 at about 11 O'clock in the morning. Though the police reached at the place of incident within 10-15 minutes, the complaint has been registered at about 3.30 p.m. and no satisfactory explanation has been putforward

by the prosecution for late recording of the complaint. Once it has been established that the telephone message has been sent in detail then, according to us, it ought to have been treated as an FIR as it was not a cryptic message. However, it has not been brought on record as a complaint although detailed information has been received over phone. It can therefore be inferred that the prosecution has smartly not brought the telephonic vardhy on record. We would therefore believe that the alleged FIR which has been brought on record by the prosecution as the FIR can be treated as the further statement of the complainant.

26. Apart from the above, there is contradiction in the names of seamers also. However, we are not entering into the same. We however concentrate on the point for determination as to whether the prosecution is able to connect the accused with the crime in question or not. We answer it in negative and reply that the prosecution has failed to establish that the lady, who accompanied the deceased at night in Champaner Hotel and thereafter to room No.104 was the appellant. We would have observed many other things regarding the register, duplicate receipt etc. of the hotel but when the appellant is able to succeed only on the main point, we are not entering

into those things.

27. As far as Criminal Appeal No.943 of 1998 filed by the State against the acquittal of original accused No.1 is concerned, it may be noted that there is no evidence on record so as to establish his presence either prior to the incident or after the incident either in the hotel or with the deceased or with the accused No.2. In short, there is no evidence on record to connect the respondent-original accused No.1 with the crime in question as established by the prosecution. Since the prosecution has failed to prove the guilt against the respondent-original accused No.1-Dinesh Bhanalal Solanki beyond reasonable doubt, he has been acquitted by the court below. As no irregularity or illegality has been committed by the court below in arriving at such a conclusion, we do not interfere with the same in view of the principles laid down in 2007(3) SCC page 755 wherein it has been held by the Apex Court in paragraph 16 as under:

> “While exercising the powers in an appeal against the order of acquittal the court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and therefore, the decision is to be characterised as perverse. Merely because two views are possible, the court of appeal would not take the view which would upset the

judgment delivered by the court below. However, the appellate court has a power to review the evidence if it is of the view that the view arrived at by the court below is perverse and the court has committed a manifest error of law and ignored the material evidence on record."

28. In view of the above, Criminal Appeal No.813 of 1998 filed by the original accused No.2 is required to be allowed and Criminal Appeal No.943 of 1998 filed by the State is required to be dismissed.

29. Thus, Criminal Appeal No.813 of 1998 is allowed. Judgment and order dated 30-7-1998 passed in Sessions Case No.192 of 1997 by the learned Addl. Sessions Judge, Panchmahal at Godhra is quashed and set aside qua the appellant-original accused No.2-Sandhyaben Balmukund, wife of Yogesh Balmukund Pandit, and she is ordered to be acquitted. She is therefore ordered to be set at liberty forthwith, if not required in any other offence. She is on bail and hence, her bail bond shall stand cancelled.

30. Criminal Appeal No.943 of 1998 filed by the State is however dismissed.

31. Office shall place a copy of this judgment in each appeal.

(R.P.DHOLAKIA,J.)

(K.S.JHAVERI,J.)

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